U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 April 2004

Case No.: 2003-STA-00024

In the Matter of:

Greg Krahn,
Complainant,

v.

United Parcel Service,
Respondent.

Appearances: Paul Taylor, Esq.
For the Claimant

Jason Schwartz, Esq.
Joshua Rosenstein, Esq.
For the Respondent

Before: Russell D. Pulver
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface and Transportation Act (the Act) of 1982, as amended, 49 U.S.C. Section 31105. Section 31105 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

On January 20, 2001, Greg Krahn (Complainant) filed a complaint with the Secretary of Labor alleging that his employer United Parcel Service (Respondent/UPS) violated the Act's employee protection provision when it discharged him from his employment as a truck driver. Following an investigation, the Secretary found insufficient evidence to establish reasonable cause to believe Respondent committed the alleged violation. Complainant subsequently filed a request for a formal hearing with the Office of Administrative Law Judges (OALJ).

This case was assigned to the undersigned on March 14, 2003. A formal hearing commenced before the undersigned on November 12, 2003 in Phoenix, Arizona, at which time all parties

were afforded a full and fair opportunity to present evidence and arguments.[1] Administrative Law Judge Exhibits (AX) 1-7, Claimant's Exhibits (CX) 1-3 and 7-18, and Respondent's Exhibits (RX) 5, 6, 9, 10, 13, 19-24, 26, 28, 29, 31-37, 41-46, were admitted into the record. Complainant, Michael Larson, Max LeBleu, Jerry Dalzell, Karla Schumann, Craig Rollie, Kerry Nelson, Robert Bartholomew, and Allan Wittal testified at the hearing. The deadline for filing post trial briefs was February 23, 2003. The undersigned subsequently extended the deadline to March 8, 2003.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent.

Issue

1. Whether Complainant engaged in activity which is protected within the meaning of the Act.

Summary of the Evidence

The Complainant was hired as an employee of Respondent on or about October 4, 1976. Transcript (TR) at 64. In 1988, Complainant became a feeder driver for Respondent and his regular job assignment included transportation of feeder units from Respondent's hub in Phoenix, AZ to Winslow, AZ and then a return to Phoenix. The feeder unit consisted of two trailers approximately 28 feet in length, a converter dolly to couple the trailers together and a truck tractor. JX 35 at 74. Complainant's last day of employment with Respondent was on September 26, 2000. TR at 64.

Respondent's corporate policy requires drivers to maintain the speed of their vehicles within the posted limits and not to exceed 65 miles per hour (mph). JX 32 at 68. Safety, fuel economy, and operational requirements are the reasons for this policy. JX 32 at 68. Thus, tractors are set to cruise at 65 mph, with a maximum speed of 68 mph. JX 32 at 68.

In 2000, a new management team was placed in Phoenix's Feeder Department headed by Robert Bartholomew. TR at 271. The team focused on drivers who reached the 60 hours of driving limit per seven day working period. According to the Department of Transportation regulations, a driver cannot drive after being on duty for 60 hours in a seven day period. TR at 1270. Once a driver exceeds the 60 hour limit he must take himself out of service and pull the vehicle over to the side of the road. TR at 1270. Drivers are immediately instructed to put themselves out of duty on the log, lock the vehicle and wait for someone to pick them up and the vehicle. TR at 1270. Complainant testified that on four separate occasions he exceeded the 60 hour limit on his fifth working day and Respondents had to dispatch another driver and supervisor to pick him up and drive him back to Respondent's terminal while another driver completed his assignment. TR at 721-2. There were no other drivers exceeding the 60 hour limit. TR at 992.

[1] The hearing dates were as follows: November 12-14, 2003 and December 8-10, 2003.

In April 2000, while in the Dispatch Office, Bartholomew overheard that someone was going to pick up Complainant because he ran out of hours. TR at 1271. Upon inquiry he discovered this was becoming a habit. TR at 1271. Finding this to be uneconomical, UPS assigned Complainant to local duties on his fifth working day. TR at 722. In response, Complainant filed a grievance pursuant to the collective bargaining agreement. TR at 1272. The ruling panel took the issue back in order to investigate the cause of excessive hours and to find a solution. TR at 1272. As a result, Bartholomew assigned Craig Rollie, an experienced feeder driver, supervisor, and trainer to perform a series of on the job supervision rides with Complainant to observe and find a solution to the problem. TR at 1272.[2]

On August 7, 2000, Rollie accompanied Complainant on his ride. TR at 157; JX 2 at 4. Rollie testified there were no unsafe conditions present as traffic was light, weather conditions were clear and dry, and the road was paved normally. TR at 846. Rollie noted Complainant wandered in his lane and failed to drive the posted speed limit when possible. TR at 842; JX 3 at 7. Complainant drove 3-5 mph slower on flat ground and 15-20 mph slower than posted limits on downgrades. JX 3 at 7. Complainant also hesitated when passing, causing him to tailgate and then when he committed to pass, blocked traffic with a slow pass. JX 3 at 6. Complainant ignored Rollie's instructions to maintain his speed and failed to respond to his questions. TR at 846. Rollie had to drive the tractor back due to Complainant's headache. TR at 370. Complainant testified the posted and corporate speed limits are not always safe. TR at 162. Complainant maintained that he always tries to drive at the maximum speed however, he drives slower in certain areas to remain in control of the vehicle. TR at 158. He could not recall any circumstances affecting the way he drove that day. Complainant did not receive any discipline from Respondent regarding his driving on August 7th. TR at 158. Complainant called in sick the next day and was out the rest of the week. TR at 847.

On August 14, 2000, Rollie accompanied Complainant on his ride for a second time. Rollie demonstrated pre-trip and coupling methods and drove to Winslow. TR at 851; JX 6 at 13. During the drive, Rollie's driving commentary and demonstrations instructed Complainant on driving areas needing improvement. JX 6 at 13. While giving these demonstrations, Rollie testified Complainant disregarded his instructions and stared out the window. TR at 852. Rollie found it safe to drive 68 mph at some points, as there were no unsafe conditions present. TR at 850. Complainant drove the trailer back from Winslow. TR at 851. While Complainant's driving improved in some areas, Rollie reminded him on four occasions to keep his speed up. TR at 173. Complainant testified he drove at speeds he believed were the maximum safest at which to operate a feeder set. TR at 167-9. Although, Complainant remarked that Respondent's equipment was unsafe and did not stay in its lane well, he offered no safety-related explanation for his actions. TR at 172 and 859.

Upon returning to the Phoenix facility a meeting occurred between Complainant, Rollie, George Sellers (Union Steward), Jerry Dalzell (Labor Manager), and Steve Stevens (Feeder

[2] Rollie has worked various jobs at UPS for 26 years. TR at 825. He has conducted roughly 300 OJS rides with feeder drivers and trained approximately 40-50 drivers, including Complainant, about the proper way to operate UPS equipment. TR at 825. He has approximately 2000 miles of driving experience and has experience driving in mountain terrain as an on-road supervisor and manager in California. TR at 1245.

Dispatch). JX 6 at 16. Thereafter, Complainant received a warning letter for his failure to follow supervisor's instructions when given a direct work order to maintain the posted speed limit. JX 9 at 19. The warning letter further informed Complainant that a continued pattern of behavior would result in further disciplinary action up to and including discharge. JX 9 at 19. Rollie testified had Complainant made an effort to comply with his instructions, he probably would not have issued a warning letter. TR at 869.

On August 15, 2000, Rollie accompanied Complainant on a third ride to observe him following the methods and procedures demonstrated for him on August 14th and to retrain him on areas needing improvement. TR at 187-8; JX 11 at 23. Due to a headache, Complainant was given a local assignment instead. During the ride, Rollie instructed Complainant to increase his speed from 52 mph to 55 mph to avoid impeding traffic. TR at 189 and 874. Rollie testified it was a clear day and there were no safety related reasons to drive slower than the posted speed limit. TR at 874. There was no conversation during the ride as Complainant was unresponsive all day. TR at 875. Complainant was not disciplined for his driving activities on August 15th. TR at 289.

On August 16, 2000, Rollie accompanied Complainant on a fourth ride. TR at 189; JX 13 at 26. The weather was clear and dry and there were no unusual road or traffic conditions. TR at 877. At times Complainant did not maintain the posted speed limit and at the top of a hill began to brake because of a curve. TR at 877-8. However, when instructed to increase his speed, Complainant complied. TR at 878. Complainant does not believe he drove safely as he concentrated more on maintaining his speed, rather than being aware of conditions around him. TR at 1454. Complainant testified driving like this was nerve wracking and made him a dangerous driver to perform this way on a daily basis. TR at 1455. Complainant offered no safety related reasons for his actions. TR at 881. Rollie testified Complainant improved considerably as he complied or attempted to comply with the instructions given. TR at 882. Because Complainant demonstrated he was able to complete his run as instructed, Rollie decided a fifth on-board training was unnecessary and on August 17, 2000, Complainant drove on his own.

On August 17, 2000, Rollie observed Complainant's pre-trip inspection and instructed Complainant to go faster. TR at 190. However, before complainant's departure, Rollie also instructed him to maintain his schedule and his speed when weather and traffic conditions permitted. JX 17 at 37. Complainant replied that Respondent does not care about his safety or the safety of the public and asked for the corporate safety manager's number in order to file a complaint. TR at 190-1. Rollie did not have the number available and Complainant subsequently departed. TR at 883. On his way back to Phoenix after attending a hearing in Flagstaff, Jerry Dalzell noticed a slow moving UPS trailer with his flashers on, a trailer later found driven by Complainant. TR at 737. Concerned there was a problem, he followed the vehicle to a rest stop and confronted Complainant. TR at 741. Complainant replied, "That's the way I drive." TR at 741. After leaving the rest stop, Dalzell followed Complainant for another hour and a half. TTR at 741. Based on Dalzell's report, Rollie decided to ride with Complainant again. TR at 883-4.

On August 18, 2000, Rollie accompanied Complainant on his ride and noted he failed to

comply with his instructions to maintain his speed. The weather was clear and dry and there were no unusual road or traffic conditions. TR at 885. Rollie repeatedly instructed Complainant to maintain his speed. TR at 886. Complainant did not comply with the instructions and failed to offer any safety-related reasons for his actions, rather he stated, "That's the way I drive.". TR at 888. At the rest stop Rollie took the keys and informed Complainant he was terminated for failure to follow supervisory instructions. TR at 894. Upon returning to the facility a formal meeting occurred and Complainant was officially terminated for failure to follow supervisory instructions when given a direct work order to maintain the speed limit. JX 21 at 44. Complainant was not told he was fired for going below 65 mph in a 65 mph zone. TR at 743. Complainant filed a grievance, and continued to work pending the outcome of his grievance. TR at 196.

On August 22, 2000, Complainant received an official notification of termination. TR at 196; JX 24 at 47. The union and Respondent were deadlocked on the case. TR at 204. The case was to move on to an arbitrator. TR at 203. Complainant continued to work until September 8, 2000. TR at 203.

During Complainant's working termination, Respondent hired an outside investigative agency to conduct surveillance of Complainant to observe his driving over the course of five days in late August to early September. TR at 747. The videotape and accompanying reports did not reveal an improvement in Complainant's driving behavior. TR at 748. Although, there were no unusual weather or traffic conditions explaining Complainant's conduct, he testified he slowed his set in some areas because of upcoming entrance ramps, his inability to see what was coming up, his need to be able to stop safely or generally to just stay in control of his vehicle. TR at 300 and 430. Complainant testified the videotape accurately reflected the manner in which he usually drove his feeder sets between Phoenix and Winslow. JX 49.

On September 5, 2000, Rollie rode with Complainant for a sixth time. TR at 901. Although, Rollie testified there was more traffic on this day, it should not have caused Complainant to drive below 65 mph. TR at 902. There was no change in Complainant's driving behavior on this day. TR at 913.

On September 8, 2000, a meeting was held regarding Complainant's failure to follow proper methods and supervisory instructions. Had the results of the surveillance tape revealed Complainant was incorporating the methods Rollie had instructed him in, Rollie would have reduced the original termination to a suspension. TR at 1285. However, despite the opportunity to fix those issues with training, Complainant's behavior had not changed. TR at 1287. Based on the surveillance tapes and his continued failure to follow supervisors instructions to maintain his speed, Complainant was fired a second time by Respondent. TR at 203; JX 27 at 60.

At an October 19, 2000, grievance hearing the panel was deadlocked on Complainant's first firing but ruled that Complainant's grievance over the September 8 firing was not timely. JX at 30.

On January 20, 2001, Complainant filed a complaint with the Secretary of Labor alleging Respondent discriminated against him in violation of 49 U.S.C. 31105. JX 36 at 82. The

Secretary found insufficient evidence to establish reasonable cause to believe Respondent committed the alleged violations. JX 34 at 70.

The testimony of Michael Larson supports Complainant's belief that the driver is the best person to determine the speed at which a commercial vehicle should be driven.[3] Larson, a commercial truck driver for the last 26 years, is presently employed with Roadway Express in Kansas City, Kansas. TR at 497. He holds a commercial motor vehicle driver's license and is qualified to haul hazardous materials and drive combination vehicles. TR at 498. Larson has experience mountain driving and operating doubles and semis. TR at 499 and 501. Larson testified he is familiar with the type of trucks Complainant drove during the summer of 2000 on his runs between Phoenix and Winslow. TR at 519. He stated it is reasonable to go less than 65 mph down curvy roads and weather and traffic are factors to consider when determining what speed to take while descending hills. TR at 540. Larsen testified the best person to determine the speed at which a commercial vehicle should be driven is the person operating the vehicle, stating the "Driver should always be the captain of the ship. The driver should always make his decisions." TR at 541. Additionally, slowing down is always an appropriate action if one does not feel comfortable going faster. TR at 547. Further, Larson stated a good driver is one who uses judgment rather than rules. TR at 548.

Rollie also testified that Respondent expects its drivers to use their judgment regarding a safe speed, and the driver is usually in the best position to determine what is safe under the circumstances. TR at 982. However, UPS does not permit its drivers to drive in any manner they see fit. TR at 999-1000. If he used the five steering habits, a driver can drive mountain grades the same way every time, assuming he has the same tractor, weight, weather, and road conditions. TR at 978.[4] In August and September of 2000, Complainant was deficient in aim high in steering, and had trouble leaving himself an out as he tailgated vehicles. TR at 999. Additionally, Complainant made no comments as to the way the tractor felt, impediments within his field of vision, or brake problems. TR at 1004. Rollie has no reason to believe that any of those factors raised any legitimate safety concerns with Complainant complying with his instructions. TR at 1004. If Complainant used Respondent's methods, he would have been able to operate his tractor trailer safely in the manner instructed. TR at 999-1000.

Similarly, Bartholomew testified that if there are abnormal traffic, road and weather conditions, a driver should have the right to adjust the vehicle's speed accordingly. TR at 1306. However, he also believes in the posted speed limit signs and does not believe that a driver needs to slow to 20 and 25 miles an hour below the speed limit signs, providing the weather, traffic and road conditions are optimal. TR at 1311. Based on his 23 years of experience in the feeder department and, "Being an instructor for the company for almost a year and training over 40 supervisors, and being out there looking out for their safety when they're on the road, as well as a supervisor, I think I have a little bit of an idea about what's safe and what's not safe." TR at 1311.

[3] Larson's testimony was offered as an expert in how the route between Phoenix and Winslow should be driven, and appropriate speeds in a set of doubles. TR at 517-8.

[4] Rollie testified the five steering habits are: aim high in steering, get the big picture, keep your eyes moving, leave yourself an out, and make sure they see you. TR at 999.

The testimony of Max LeBleu supports Respondent's position that an experienced driver should not have problems operating a set of doubles at 65 mph between Phoenix and Winslow and back. LeBleu, an expert in truck safety driving, is currently the Arizona Safety Program Manager and is responsible for overseeing truck safety in the state. TR at 648. The program oversees accident ratios and deals with companies employing unsafe practices. TR at 666. Although, LeBleu has driven flat bed trucks, he has no experience driving doubles or semi tractor trailers on mountain terrains. TR at 653. The program used to calculate traffic time plugs speed limits into distance but does not take into consideration traffic, the slope of the grade, how much laden weight the driver is pulling or equipment capabilities. TR at 689-690. The program used is purely a mathematical formula. TR at 690. However, LeBleu believes in running with the flow of traffic, and if the flow of traffic is doing 65 mph, he encourages finding a safe speed and staying at 65. TR at 691.

Additionally, Kerry Nelson performed a physical run and time trial of Complainant's route to discover whether Complainant's reduction in speed was reasonable. TR at 1046 and 1049.[5] Nelson drove the same set of doubles as Complainant and the tractor trailer was fully loaded. TR at 1048. There were no inclement weather or traffic conditions enabling Nelson to complete the run in seven hours. TR at 1047 and 1078.[6] Nelson maintained a speed of 65 mph and saw no reasonable need to drop below 60 mph at the bottom of the hill. TR at 1053. Based on his trial run and review of the surveillance videotape Nelson could not find any reasonableness in Complainant's actions in driving slower, braking when he did and wandering in his lane. TR at 1077-78. Moreover, Nelson testified that there are dangers associated with driving a tractor trailer too slowly, as the slower one goes, the more of a hazard he is and the more of a chance he stands to have a collision. TR at 1076 and 1226. Respondent's speed limit policy of 65-68 mph is reasonable, especially since most of the trucking companies around the nation have a controlled speed limit for their operation. TR at 1077. Nelson further stated that not only were the instructions given to Complainant by Respondent reasonable, but Complainant's actions were less justified because of his experience and knowledge of the road and his tractor trailer. TR at 1227.

Allan Wittal represented Complainant in the grievance hearing disputing the assignment of local routes on his fifth working day. TR at 1415.[7] Wittal was not aware of any similar claims from any other drivers besides complainant. TR at 1417. He also attended the meeting with Complainant on August 18, 2000, involving Complainant's refusal to comply with his supervisor's instructions. TR at 1417. Wittal testified Complainant was offered adequate opportunities to improve his driving and never expressed any specific safety-related reasons for his refusal to comply with Rollie's instructions. TR at 1419. Based on his experience, Wittal stated safety rides can lead to discipline if instructions are not followed on the second ride. TR at 1437. After one of the grievance hearings he advised Complainant to behave and follow Respondent's instructions. TR at 1440.

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[5] Nelson has provided litigation services involving heavy vehicle accidents for the past 18 years. TR at 1041. He has experience in the area of truck safety, driver training, and accident reconstruction. TR at 1042. The last time he was regularly employed as a truck driver was 1990-1991, and he was only an occasional truck driver, and did not drive doubles. TR at 1088.

[6] Nelson was familiar with the route before the mock run, both as a patrolman and a civilian. TR at 1050.

[7] In 2000, Wittal was employed as a Business Representative for Teamster Local 104 however, he is currently retired. TR at 1415.

Complainant testified he sought alternate employment after his termination by calling major motor carriers, checking want ads, and submitting applications for employment via the internet. TR at 206. Complainant also sought employment with non union carriers. TR at 207. He was unable to obtain such employment as none of the carriers offered equivalent compensation or working conditions as Respondent. TR at 209 and 442. Since his discharge Complainant has done work as a handyman, but retained minuscule net earnings. TR at 209. Complainant seeks to resume working at UPS because of his 24 year history with the company. TR at 216.

Carla Schumann, testified Complainant never contacted her seeking assistance in obtaining comparable employment with another union carrier. TR at 805. In 2000, Schumann was a business representative in the Teamsters Local that represents feeder drivers. TR at 801. Her responsibilities include contract enforcement negotiations and adjudicating issues. TR at 801-2. Schumann testified she could have assisted Complainant in finding jobs offering comparable UPS benefits packages. TR at 805. However, because Consolidated Freightways closed on or about Labor Day in 2000, the market was flooded with commercial drivers looking for work in the union sphere in Phoenix. TR at 808-9. Additionally, the Union's job is not to act as a job placement agency, rather as a medium of assistance. TR at 813.

Wittal also testified that he believed in or about September and October 2000 the terms of teamsters agreements with other carriers in the state of Arizona would have provided similar benefits to the contract that the Teamsters had with Respondent. TR at 1442. Freight wages, if running on a local route were right about even with that paid by Respondent.

Complainant also testified he suffered emotional distress since his discharge. TR at 210. He has difficulty sleeping, has become extremely depressed and lost focus. TR at 210. At the time of trial he was taking Prozac for his depression. TR at 213. Complainant requests damages he would have had had he not been fired, his pension and any penalties, and awards for emotional distress and attorney fees. TR at 217.

Discussion

Under the burdens of proof and production in STAA proceedings, a complainant must first make a prima facie showing that protected activity motivated the respondent's decision to subject the complainant to adverse employment action. The respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. See e.g., *Scott v. Roadway Express, Inc.,* ARB No. 99-013, ALJ No. 98-STA-8, slip op. at 7 (ARB July 28, 1999) citing *Clean Harbors Envtl. Svcs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) and *Moon v. Transp. Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987).

Once the respondent presents evidence of a nondiscriminatory reason for adverse employment action, the burden shifts to the complainant to prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a pretext for discrimination. *Calhoun v. United Parcel Serv.,* ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002), citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In proving that a respondent's asserted reason for adverse action is pretextual, the complainant must prove not

only that the respondent's asserted reason is false, but also that discrimination was the true reason for the adverse action. At all times, the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the complainant. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Clement v. Milwaukee Transport Services, Inc.*, ARB No. 02-025, ALJ No. 2001-STA-6 (ARB Aug. 29, 2003).

Once a case has been fully tried on the merits, it is not particularly useful to analyze whether the complainant has presented a prima facie case. Rather, the relevant inquiry is whether Complainant established, by a preponderance of the evidence, that the reason for his discharge was his protected activity. *Pike v. Public Storage Companies, Inc.,* ARB No. 99-072, ALJ No. 1998-STA-35 9 (ARB Aug. 10, 1999), citing *Frechin v. Yellow Freight Systems, Inc.,* ARB No. 97-147, ALJ No. 96-STA-34, Final Dec. and Ord. Jan. 13, 1998, slip op. at 1.

Protected Activity

Under the Act, the Complainant must show he engaged in protected activity. The Surface Transportation Assistance Act provides:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-
>
> > (A) The employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > (B) The employee refuses to operate a vehicle because-
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. §31105(a).

The employee protection provisions of the Act prohibit the discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety.

Under 49 U.S.C. Sec. 31105(a)(1)(A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Internal complaints to any level of management have consistently been held to be "complaints" under the Act. See *Clean Harbors Envtl. Svcs., Inc.,* supra; *Zurenda v. J&K Plumbing & Heating Co., Inc.,* 97-STA-16 (ARB June 12, 1998); *Williams v. CMS Transportation Services, Inc.,* 94-STA-5 (Sec'y Oct. 25, 1995). However, internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. *Clean Harbors Envtl. Svcs. Inc.*, supra. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with the employer within the meaning of the Act. *Id.*

The undersigned finds Complainant has not proved by a preponderance of the evidence that he actually made an internal complaint to Respondent. During his employment with Respondent, Complainant never complained to higher management that the instructed speed was unsafe or illegal. Rather, when instructed by Rollie to maintain the corporate and posted speed limit, Complainant frequently ignored the instructions or replied, "That is the way I drive." There is no evidence in the record that Complainant voiced any safety concerns to Respondent regarding the instructions given. Additionally, Complainant's request for the corporate safety manager's number was too generalized and informal to constitute a complaint as he never stated the reason for the request, nor did he subsequently bring a complaint with the safety committee. Had Complainant given a reason, at the time, for his failure to comply with instructions, this would have served as a complaint and constituted protected activity. However, because Complainant failed to voice any safety related concerns his conduct did not constitute a protected complaint.

Even were the undersigned to assume arguendo that Complainant made an internal complaint, the complaint still fails because of Complainant's inability to prove by a preponderance of the evidence that the instructions violated federal safety regulations or that he had an objectively reasonable apprehension of serious injury.

The "refusal to drive" provision, 49 U.S.C. §31105(a)(1)(B), has two subparagraphs. To be protected under subparagraph (i), the complainant must show that operating the vehicle would have caused an actual violation of a motor carrier safety regulation; it is not sufficient that the driver has a reasonable belief about a violation. To be protected under subparagraph (ii), the employee must have a reasonable apprehension of serious injury. An apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment to health. In addition, the employee must have sought from his employer, and been unable to obtain, correction of the unsafe conditions causing him apprehension of injury to himself or to the public. *Williams v. Carretta Trucking, Inc.*, 94-STA-7 (Sec'y Feb. 15, 1995).

Here, Complainant argues he was terminated because he refused to maintain his speed at the corporate and posted limits when the operation of his vehicle would have violated a regulation and because he had a reasonable apprehension of serious injury to himself or the public due to unsafe instructions. The undersigned finds Complainant's arguments under both theories

without merit and his refusal to comply with supervisory instructions to maintain his speed did not constitute protected activity.

First, in order to come within the protection of this provision, an employee must actually refuse to operate a vehicle. 49 U.S.C. § 31105(a)(1)(B); *Williams,*94-STA-5 (holding Complainant did not engage in protected activity because, although he complained about being required to violate D.O.T. regulations to make the run, there was no evidence that he refused to make the trip); see also *Zurenda,* supra (concluding the driver's conduct of actually driving the truck, despite his complaints about the condition of the truck he was to drive, did not constitute a refusal to drive and was more properly analyzed under the complaint provision of section 31105(a)(1)(A). The undersigned finds there is no evidence of record indicating Complainant refused any driving assignment in this matter. Even accepting Complainant's testimony that he repeatedly refused to maintain a certain speed, he never actually refused to operate the vehicle on each day assigned, nor voiced a reason for his refusal. Additionally, when instructed by Rollie to maintain his speed, Complainant either ignored or complied with the instructions, but always continued to operate the vehicle. Moreover, he never pulled over during a run for the reason that it was unsafe to drive the vehicle at the instructed speed.

Second, Complainant has not shown that operating the vehicle would have violated a federal safety regulation. While Complainant argues that following Respondent's instructions to maintain his speed would have violated 49 C.F.R. Sections 392.2, 392.6, 392.7 and 392.13, Respondent contends Complainant did not establish the essential elements of his claim under any of the regulations on which he purports to rely. The undersigned finds Respondent's argument persuasive and concludes Complainant failed to establish by a preponderance of the evidence that operating the vehicle as instructed would have violated a federal safety regulation.

Third, Complainant has failed to show that following Respondent's instructions created an objectively reasonable apprehension of serious injury. There were no specific safety related concerns or conditions affecting the way Complainant drove on the dates, times and locations at issue. Complainant failed to prove his apprehension was based on the unsafe condition of the vehicle and he only testified to general and subjective concerns regarding why he believed maintaining the speed was unsafe, such as downhill slopes and curves. In addition, on the days Complainant refused to follow instructions to maintain his speed there was no specific weather, traffic or road conditions or defects in the truck explaining his apprehension. TR at 846 and 877. Furthermore, Complainant made no comment as the condition of the tractor trailer, impediments within his field of vision, weather or brake problems. TR at 1004. Therefore, none of those factors raise any legitimate concerns.

Additionally, Respondent's expert witness, other feeder drivers, and supervisors demonstrated they were able to perform the ride under the same circumstances, while maintaining the instructed speed, without an apprehension of serious injury. Moreover, the record reveals that on occasion, Complainant successfully made the run without incident and within the allotted time when complying with instructions to maintain his speed. The undersigned concludes this

evidence clearly supports the position that Complainant's apprehension was not objectively reasonable. [8]

Therefore, in light of the circumstances of this case, the undersigned finds Complainant has not established by a preponderance of the evidence that he engaged in a protected activity under the Act, and his complaint must be dismissed.

Conclusion

Based on the above specific findings of fact and recommended conclusions of law the following recommended order is issued.

RECOMMENDED ORDER

It is hereby **RECOMMENDED** that Complainant's claim under the Act be **DENIED.**

A

Russell D. Pulver
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. See

[8] Larson testified a, "Driver should always be the captain of the ship," and this can be true to some extent as everyone charts their own destiny. However, a captain reports to an admiral. And, when a captain's conduct is inconsistent with an admiral's instructions, the captain must be able to explain the reasonableness of his actions. Here, Complainant failed to do this.